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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MELVIN DONNELL FRANKLIN, Defendant and Appellant.	H045914 (San Benito County Super. Ct. No. 4377)

Defendant Melvin Donnell Franklin appeals from the denial of his Proposition 47 petitions seeking resentencing on four commercial burglary (Pen. Code, § 459) counts for which he had originally been sentenced to four consecutive terms of 25 years to life. The trial court found these counts ineligible for resentencing. We affirm.

I. Background

In 1994, defendant was convicted by jury trial of four counts of commercial burglary, one count of possession of stolen property (Pen. Code, § 496), and one count of possession of cocaine (Health & Safety Code, § 11350). Two of the burglaries were of a market, and the other two were of a recycling center. The possession of stolen property count was based on property taken from the recycling center. The trial court found true two prior strike conviction allegations. Defendant was committed to state prison to serve

five consecutive terms of 25 years to life for the burglary and cocaine counts. Sentence for the possession of stolen property count was stayed under Penal Code section 654.

In January 2018, defendant filed six pro per Proposition 47 petitions seeking resentencing on his six 1994 convictions.[1] The form petitions contained declarations by defendant that three of the four commercial burglary offenses had involved thefts of less than $950. No other description of those offenses was provided.

On February 7, 2018, the trial court set a hearing for February 21 on the petitions. Defendant was not present at the February 21 hearing, and the matter was continued to March 7. Defendant was not present at the March 7 hearing, and the court appointed public defender Arthur Cantu to represent defendant. The court also asked the probation department to prepare a report. The matter was continued to March 21.

At the March 21, 2018 hearing, Cantu appeared for defendant and noted that defendant "is not present. Apparently still residing in CDC." The prosecutor conceded that the possession counts were eligible for Proposition 47 relief but assert that the commercial burglary counts were ineligible because they were of "closed businesses . . . ." The court asked if the burglaries had occurred "[o]utside of normal work hours," and the prosecutor confirmed that they had. When he was given the opportunity to respond, Cantu said: "That's a fair representation of the state of the case, Your Honor" and submitted. The court denied the commercial burglary petitions and continued the other two petitions to April 18. The probation department filed a report recommending that defendant be resentenced on the two possession counts since the stolen property he had possessed was $3.79 of stolen currency.

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[1] Defendant, who is currently serving his sentence for these convictions, checked the wrong boxes on the forms and requested reduction of these convictions to misdemeanors instead of resentencing. The trial court properly interpreted his petitions as seeking resentencing.

At the April 18, 2018 hearing, Cantu appeared and stated: "I don't believe Mr. Franklin is present. But there is a petition to have his 459 reduced to a misdemeanor." The prosecutor told the court that it was his "understanding none of the 459s are eligible. They are all actual commercial burglaries to proposed [*sic*] businesses." The court and counsel agreed that the two possession counts were eligible for relief, and the court asked Cantu if he had "any comment?" Cantu replied: "Submit it, Your Honor."

This colloquy followed: "THE COURT: Okay. That would reduce his sentence from hundred twenty-five years to life to hundred, correct, Mr. Cantu? [¶] MR. CANTU: I don't have the breakdown of how the original sentence -- I don't have that abstract of judgment. But I would submit it, Your Honor, as been it sounds correct, two life terms. [¶] THE COURT: Hold on a second. Looking at the abstract, the -- yes, that should do it because the 496 was stayed under 654 so that would have no impact, and so the only other one would be Count 6, the 11350. Okay. Anything else from probation to add? [¶] MS. SAUCEDO: None at this time. [¶] THE COURT: People? [¶] MR. SHILLING [the prosecutor]: People would submit. [¶] THE COURT: Mr. Cantu? [¶] MR. CANTU: Submit it. [¶] THE COURT: Then I will modify the sentence as to Count 5 [(the stolen property count)], that would be reduced to a misdemeanor, it still would remain stayed and Count 6 [(the cocaine count)] would be reduced to a misdemeanor, three hundred sixty-four days run concurrent in the felony. [¶] As to Counts 1, 2, 3 and 4 the sentence is modified to hundred to life, that's the only modification, and the abstract can reflect that modification and no others."

Defendant timely filed a notice of appeal from the court's decision to deny his Proposition 47 petitions regarding the burglary counts.

II. Discussion

Defendant's appointed appellate counsel filed an appellate brief "in accordance with" *People v. Wende* (1979) 25 Cal.3d 436 and *People v. Serrano* (2012) 211 Cal.App.4th 496. Defendant was notified of his right to submit a supplemental brief, and he did so. In his brief, defendant contends that (1) the commercial burglary count relating to the same theft as the stolen property count must be stricken because he could not be convicted of both stealing and possessing the same property, (2) he was deprived of his right to be present at the hearings on his petitions, and (3) Cantu was prejudicially deficient in failing to raise either of these issues in the trial court. The only prejudice defendant asserts in his appeal is that the trial court failed to strike the commercial burglary count relating to the same theft as the stolen property count.

The simple answer to defendant's first contention is that the statutory rule that a defendant may not be convicted of stealing and possessing the same property (Pen. Code, § 496, subd. (a)) does not apply to burglary. A defendant properly may be convicted of burglary and possession of stolen property based on the property taken in the burglary. (*People v. Allen* (1999) 21 Cal.4th 846, 849.) It follows that Cantu was not deficient in failing to raise this issue below.

His second contention also fails. "'A defendant . . . "does not have a right to be present at every hearing held in the course of a trial." [Citation.] A defendant's presence is required if it "bears a reasonable and substantial relation to his full opportunity to defend against the charges." [Citation.]' [Citations.] . . . 'The defendant must show that any violation of this right resulted in prejudice or violated the defendant's right to a fair and impartial trial. [Citation.]'" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1052.) Defendant makes no attempt to demonstrate that his absence from the hearings below prejudiced him in any respect. Cantu was not prejudicially deficient in failing to raise this issue at the hearing and in failing to ensure that defendant was present at the hearing.

Defendant's appeal lacks any arguable merit. "The ultimate burden of proving section 1170.18 eligibility lies with the petitioner. [Citation.] In some cases, the uncontested information in the petition and record of conviction may be enough for the petitioner to establish this eligibility. . . . But in other cases, eligibility for resentencing may turn on facts that are not established by either the uncontested petition or the record of conviction. In these cases, an evidentiary hearing may be 'required . . . .'" (*People v. Romanowski* (2017) 2 Cal.5th 903, 916.)

In this case, the face of defendant's petitions did not indicate whether or not his second degree burglary convictions were eligible for Proposition 47 relief. Although the appellate record does not include any indication of the facts of defendant's offenses other than the prosecutor's representations at the hearings, his appointed appellate counsel asks this court to take judicial notice of the appellate opinion in defendant's appeal from the original 1994 judgment. "In ruling on a petition for resentencing, the trial court may consider the entire record of conviction including the transcript of the trial testimony and the appellate opinion affirming the judgment of conviction." (*People v. Cruz* (2017) 15 Cal.App.5th 1105, 1110; see also *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1063.) We grant the request for judicial notice.

A commercial burglary conviction is eligible for Proposition 47 relief only if the burglary occurred while the business was "open during regular business hours." (Pen. Code, § 459.5.) The prosecutor asserted below, and the trial court accepted, that the burglary counts were ineligible for Proposition 47 relief because they had occurred when the businesses were closed. As this court's opinion in defendant's appeal from his 1994 convictions reflects, the four burglaries in question all occurred in the middle of the night when the recycling center and the market were not open for business. Hence, the record establishes beyond a reasonable doubt (*People v. Frierson* (2017) 4 Cal.5th 225, 240) that none of these four convictions was eligible for Proposition 47 relief.

We have exercised our discretion to retain this matter and review the record independently, and we have found no arguable issues on appeal.

III. Disposition

The order is affirmed.

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Mihara, J.

WE CONCUR:

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Elia, Acting P. J.

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Bamattre-Manoukian, J.

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